DATE: October 2, 1997

CASE NO.: 97-ERA-00031

In the Matter of

**TED ELTZROTH**
Complainant

v.

**AMERSHAM MEDI-PHYSICS, INC.**
Respondent

Appearances:

Ted Eltzroth, pro se

Alan S. King, Esquire,
On behalf of Respondent

Before: Ainsworth H. Brown
Administrative Law Judge

## RECOMMENDED DECISION AND ORDER

This is a proceeding brought under the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5851, and the regulations promulgated thereunder at 20 C.F.R. Part 24. These provisions protect employees against discrimination for attempting to carry out the purposes of the ERA or of the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2011, et seq. The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees at facilities licensed by the Nuclear Regulatory Commission ("NRC"), who are discharged or otherwise discriminated against with regard to their terms and conditions of employment, for taking any action relating to the fulfillment of safety or other requirements established by the NRC.

In the instant case, Complainant filed a complaint with the Department of Labor on February 22, 1997. After an investigation by the Department of Labor (DOL), which found Complainant was discharged due to refusal to perform his assigned task, Complainant appealed to this Office by letter received on March 7, 1997. A

hearing was held before me in Chicago, Illinois on June 24, 1997 whereupon testimony was presented and exhibits were admitted into the record. The parties were given sixty days to submit written closing arguments in this matter. Additionally, Complainant was to provide Respondent with bibliographic information regarding a scientific text referred to by Complainant in his testimony and subsequently on his written argument. Complainant's argument was received on August 1, 1997 and Respondent submitted his argument on August 25, 1997, whereupon the record was closed.

This case concerns Complainant's discharge from his position as a radioactive "seed" inspector for Respondent. Complainant contends that he was fired after, and as a result of, his informing Respondent's employees that he perceived a safety hazard in the inspection process which exposed him to high doses of radiation. He initially refused to perform the task and informed Respondent that he would consider whether he would ultimately perform the job. He was terminated the next day. Respondent argues that Complainant was fired solely because of his failure to perform the job for which he was hired, that his activity was not protected under the ERA, and that, even if his whistleblowing activity contributed to his release, Respondent would have been discharged.

## I. Applicable Law

In order for Complainant to prevail under the ERA through reliance upon circumstantial evidence, he must first establish a prima facie case of retaliatory action by Respondent, to wit: he must establish that (1) he was engaged in protected activity, (2) Respondent was aware of the conduct, and (3) Respondent took an adverse action against him. Zinn v. University of Missouri, 93-ERA-34 and 36 (Sec'y Jan. 18, 1996); Dartey v. Zack Co. Of Chicago, 82-ERA-2 (Sec'y Apr. 25, 1983), slip op. at 6-9; Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Complainant must also offer evidence sufficient to raise the inference that the adverse action was likely caused or contributed to by the protected activity. Id.; 42 U.S.C.A. §5851 (b)(3)(C).

If Complainant establishes this prima facie case, Respondent must produce evidence that the alleged adverse action was motivated by legitimate, non-discriminatory reasons. The Respondent's burden is one of production only. Zinn, supra; Burdine, supra at 254-255.

In the event that Respondent is successful in articulating the above, the burden of proof shifts again to Complainant. Complainant must then show that Respondent's proffered business

reasons are mere pretext for discrimination. Id.; Frady v. Tennessee Valley Authority, 92-ERA-19 and 34 (Sec'y Oct. 23, 1995); Samodurov v. General Physics Corp., 89-ERA-20 (Sec'y Nov. 16, 1993). At all times during the above analysis, the burden of showing by a preponderance of the evidence that Respondent was motivated by illegal animus rests with Complainant. Samodurov, supra.

If it is determined that a violation exists, i.e., that Respondent was motivated at least in part by discriminatory animus, then Respondent, in order to avoid liability, must show by clear and convincing evidence that it would have reached the same decision even in the absence of protected conduct. 42 U.S.C.A. 5851(b)(3)(B).

## II. Testimony and Exhibits

### Witness Testimony

Determination of this matter depends in large part upon evaluation of the testimony presented at the hearing, which consisted of testimony by Complainant, Edward Zdunek, Respondent's Radiation Safety Officer, and Raymond Wronkiewicz, who was a quality control supervisor for Respondent at the time of Complainant's employment.

Complainant testified that he was hired on a temporary, full-time basis by Respondent in February, 1997 to inspect its "I-125 seeds", which are radioactive, at the rate of fourteen dollars per hour. (TR 10, 12, 21). On the first day of work, February 3, he was provided with radiation training, and he underwent inspection training on the second day. The inspection process entailed placing his hands into gloves, projecting them through an opening in a wall, and, by manipulation of tweezers, picking up and raising a radioactive seed from a collection of ten to thirty seeds placed on a table. The seed is then sized through the use of a tool. (TR 11). On that day he was asked to attempt to perform the inspection, whereupon he inserted a radiation detector into the one of the gloves in order to ensure he was adequately protected from radiation. (TR 11 - 12). At the time the tray had approximately eighty seeds upon it. (TR 40). According to his reading, he concluded that "little to no protection" was afforded from the glove, and he did not perform the task. (TR 12 - 13). His trainer, who was present, was unaware of the level of radiation projected from the seeds, and she referred Complainant to Ed Zdunek. (TR 13). That night, Complainant concluded that the exposure rate was significant, after performing some preliminary calculations. Id. The

following day he discussed the matter with Mr. Zdunek, who explained that the company monitored radiation exposure through nuclear emulsion badges, and that data indicated the exposure rates were within the applicable limits. Id. (TR 13 - 14). Upon indicating that he remained uncomfortable with the task, and that he wanted to verify his calculations, he proceeded to his immediate supervisor, Ray Wronkiewicz, the following day. (TR 14). Both returned to the task area and placed eight layers of gloves over Complainant's detector, which revealed no radiation diminution. He asked if he could confirm his calculations and then inform Mr. Wronkiewicz whether Complainant would perform the job, since he would have left if his rates of radiation were verified, had he not been fired. (TR 14). He was indeed fired the next day, on February 5, 1997. (TR 20). According to Complainant, he believed that he would not have been fired had he performed the inspection work. (TR 38).

Complainant stated that his calculations were indeed verified by several health physics departments, and they yielded an exposure rate of 1 to 1.5 rads per hour from the seeds, compared to the federal limit of 75 rads annually. (TR 15). The result was theoretical in nature, rather than a direct measurement of radiation exposure, he stated. (TR 37). He used a text by Shapiro to arrive at his results. He cited the same source for the proposition that the monitoring badges were not completely effective, although, to his knowledge, Respondent's monitoring techniques were acceptable to the IDNS. (TR 27, 37). Prior to working for Employer, Complainant had no experience monitoring radiation or conducting testing. (TR 38).

Aside from the aforementioned persons, whom Complainant contends understood but did not appreciate the serious nature of the exposure issue, Complainant also informed the Illinois Department of Nuclear Safety (IDNS) and the Nuclear Regulatory Commission (NRC). (TR 18, 25). The former also performed the calculation and attained a similar result, but did not proceed since Employer's paperwork was in order, while the NRC believed he had grounds for a discrimination suit, according to Complainant. (TR 18). He acknowledged that the IDNS dismissed the complaint, finding it to be without merit. (TR 32). He also believed neither agency was willing to examine beyond the available paperwork in order to assess the merits of his complaint, but stated that he was unaware of their inspection protocol. (TR 28 - 30).

Testimony was also given by Edward A. Zdunek, the radiation safety officer at Amersham, and a former inspector for IDNS. (TR 47 - 48). Mr. Zdunek, who attained his Bachelors of Science in

industrial occupational safety from Illinois State University, explained that Complainant's work station protected against radiation exposure through the use of a leaded plexiglass shield, tweezers (which provide distance from the radioactive material), leaded gloves and a controlled number of between ten and thirty seeds. (TR 50, 73, 106). Heavier leaded gloves had been used, but were found too cumbersome for the task. Id. The area covered by the gloves varied from person to person according to his/her size. (TR 106 - 107). Radiation exposure rates in that station are among the lowest in the facility. (TR 51).

Exposure rates are measured by dosimeter badges; one reflects whole body exposure and another reads the exposure on the employee's hands, and is located on the hand, on a ring under a leaded glove. (TR 53, 74 - 75, 84, 113). They are collected on a bimonthly basis and forwarded to a company that reads the badges, quantifies their rates and forwards the data to Respondent. (TR 53). The results are stored and reviewed, as well as posted for employee inspection. (TR 53 - 54). Extremity exposures in the area are ten percent of the regulatory limit, according to Mr. Zdunek. (TR 82). It was theoretically possible that one's forearm could be exposed to 100 millirems in a 15 minute span, depending upon the number of seeds, and whether the forearm is exposed. (TR 88 - 91). Safety measures are based in part upon these practical measurements, both of which are standard in the industry, as well as upon theoretical values, with a view toward field exposure for the workers. (TR 82 - 84, 113). Never has an employee exceeded the regulatory limits during Mr. Zdunek's tenure, and Complainant's badge results reflected no appreciable exposure. (TR 54 - 55).

Mr. Zdunek stated that NRC permissible exposure rates for the position were 5 roentgen equivalent man (rem) for the whole body and 50 rems for an extremity. Id. Respondent's in-house limits are 2 rem for the whole body and 30 rem for extremities. (TR 54). In addition, Respondent has a department-by-department program to limit exposure as low as reasonably achievable (ALARA), in which a subcommittee of employees raise issues and concerns. (TR 56 - 58). Further, a safety meeting is held on a monthly basis affording employees the opportunity to voice their concerns on through their ALARA representative. (TR 58). Mr. Zdunek is aware of no employee that has been discharged or disciplined for raising or discussing a safety concern. (TR 58).

Mr. Zdunek essentially confirmed Complainant's account of the events of February 3, 1997. (TR 62). On February 4th the two gentlemen were introduced, and on the 5th, after being told Complainant did not wish to work with any radioactive materials,

Mr. Zdunek met with Complainant to discuss his apparently genuine concerns regarding exposure. (TR 65, 98). The drawbacks of heavier leaded gloves were explained, after Complainant proposed their use. (TR 66). The regulatory, Amersham and ALARA limits were explained, and documents addressing biological effects of radiation and other topics were offered and declined. (TR 66, 68). After the meeting Mr. Zdunek informed Jay Reed, the quality control manager, of Complainant's discomfort and refusal to change his mind regarding the task. (TR 69).

According to Mr. Zdunek, Complainant's measuring instrument does not measure radiation exposure. Rather, it is designed for environmental monitoring, which entails contamination detection, not dose rates. (TR 67). Thus, it is very radiation-sensitive, in order to determine whether any radiation at all is present. (TR 68). It is used by Respondent to ensure that no radioactive seeds were left behind at the work station. (TR 67 - 68). Moreover, Mr. Zdunek asserted that Complainant's calculation of an exposure rate of 1.4 rads per hour refers to actual contact with the seed, rather than exposure from the task, which is conducted three inches from the radioactive source. (TR 69 - 70). It is possible, but not normal, for the forearm to pass over the seed, according to Mr. Zdunek, and the forearm has no specific badge for monitoring. (TR 76, 80).

With regard to the one-day investigation conducted by IDNS, a team arrived, interviewed those who had contact with Complainant, and performed radiation surveys of the area with representative samples, in order to ascertain the effectiveness of the gloves and the radiation levels in the area. (TR 116). Mr. Zdunek became acquainted with Mr. Bruce Sanza, the author of the letter from IDNS, from Mr. Zdunek's prior employment at IDNS. (TR 102).

Raymond F. Wronkiewicz, who was the quality control supervisor at the time of Complainant's employment, provided testimony as well. (TR 118 - 119). He interviewed and hired Mr. Eltzroth, and was his supervisor. (TR 120 - 123). During the interview Mr. Wronkiewicz informed Complainant that he would receive radiation dosage within the NRC and IDNS guidelines during the course of his employment, and the latter indicated that such exposure did not pose a problem for him. (TR 122). During a tour of the facility Mr. Wronkiewicz showed Complainant dosage charts of other employees, and Complainant again indicated that he did not have a problem with the issue of radiation dosage. Id.

On the February 4, 1997 (the second day of Complainant's

employment) Mr. Wronkiewicz was informed that Complainant did not wish to perform the test inspection, and they met to discuss the matter. Complainant stated that he was concerned that he would be receiving too much radiation from the job, and he declined to performed the test. (TR 124). After re-explaining the process and attempting to alleviate this concern, Mr. Wronkiewicz was told by Complainant that he was still unwilling to perform the job. (TR 125). Mr. Wronkiewicz then reminded Complainant that he was informed of, hired and agreed to perform this task. Complainant then requested time to think the matter over, but did not indicate whether or not he would perform the job in the future. (TR 126). He was assigned to work unrelated to radiation, and was directed to Mr. Zdunek. (TR 126 - 127). The following day Mr. Wronkiewicz again met with Complainant, informed him of historical radiation data reflecting results well within "the limits," and reminded him that the visual inspection was a duty he accepted when he agreed to work for Respondent. (TR 127). Complainant stated that he wanted radiation exposure "reduced to zero," and again requested time to think about the matter overnight. (TR 127 - 128). Mr. Wronkiewicz did not recall granting the request, nor being told that Complainant wanted the time in order to verify his calculations. (TR 130 - 131). Mr. Wronkiewicz later informed his supervisor, Jay Reed, of the situation, and they decided Complainant would be uncomfortable with the job, particularly since Mr. Zdunek tried to allay Mr. Eltzroth's fears through historical data and reference materials. (TR 128). They then decided to terminate his employment. Id.

Mr. Wronkiewicz also testified that safety issues are raised frequently, and are investigated and reported upon. (TR 128).

**Exhibits**

Respondent submitted a copy of the IDNS report, dated April 8, 1997, which set forth the finding of its investigation. (RX 1)[1]. A demonstration of the inspection procedure revealed use of appropriate shielding techniques, and records revealed no employee exposure in excess of the regulatory or administrative limits. The demonstration showed no high radiation area. The report concluded by stating that Complainant was terminated for refusal to perform required duties, rather than because of his safety concerns. (RX 1).

Mr. Zdunek drafted a file memorandum which essentially echoes his testimony regarding the events of February 5, 1997 and his interaction with Complainant. (RX 3). Attached is a memorandum describing, in substance, Mr. Wronkiewicz's testimony as well. In addition, J. Graney, a coworker, drafted a memo

which stated that on February 4, 1997 she trained Complainant to inspect the seeds. (RX 3). In the morning both she and Mr. Eltzroth performed the test, and then, in the afternoon, he was assigned to perform the test alone. It was then that he inserted the radiation meter into the glove, and informed Ms. Graney of the results. She then completed the test, and they both proceeded to confer with Mr. Wronkiewicz. Reports by S. Drews and T. Fraser, co-workers, also appear in the record, indicating various tasks they taught to Complainant. (RX 3). A brief note by K. Foster, a receptionist, reflected that Complainant stated to her that "he was 'chicken' to work with radioactivity and that he was sorry he was leaving." (RX 3). Various documents pertaining to Complainant's instruction are also in the record. (RX 4).

## III. Findings of Fact and Conclusions of Law

It appears from the testimony and exhibits in the record that the occurrences on January 28 and February 3, 4 and 5, 1997 are largely undisputed. Mr. Eltzroth was interviewed on January 28 by Mr. Wronkiewicz, and informed of the nature of the job, which included some exposure to radiation within applicable regulatory and guideline limits. Complainant expressed acceptance of these conditions, and indicated that he was interested in the position. Complainant did not contest this accounting. Further, on February 4, after receiving training for the task, Mr. Eltzroth was charged with performing a seeds inspection, upon which he inserted a radiation detector into the glove, which revealed the presence of radiation. He refused to perform the task. He informed Ms. Graney, who was training him, and she in turn referred him to Mr. Zdunek, the radiation safety officer, who explained the monitoring system and addressed Complainant's concerns regarding undue exposure. Complainant remained concerned, and on February 4 he met with his supervisor, Mr. Wronkiewicz, who reiterated the inspection process and tried to assuage Complainant's apprehension. Undeterred, he continued to refuse to perform the job, and was reminded by Mr. Wronkiewicz that he was hired to, and agreed to, perform the inspection work, with knowledge of the radiation exposure. Complainant requested time to ponder the matter and, prior to his informing Respondent of his decision, Complainant's employment was terminated.

I find that Complainant has satisfied his prima facie case. That he was engaged in protected activity is apparent. The Act provides that notification of an employer of an alleged violation of the Act constitutes protected activity. 42 U.S.C. §5851(a)(1)(A); West v. Systems Applications International, 94-CAA-15 (Sec'y Apr. 19, 1995), slip op. 6-7. Further, an

employee may not be adversely treated for refusal to engage in any practice made unlawful under the Act, provided he made the employer aware of the alleged illegality. 42 U.S.C. §5851(a)(1)(B). Moreover, an employee may refuse to perform certain work without fear of discrimination, provided he has "a good faith, reasonable belief that working conditions are unsafe or unhealthful. Whether the belief is reasonable depends on the knowledge available to a reasonable [person] in the circumstances with the employee's training and experience." Pensyl v. Catalytic, Inc., Case No. 83-ERA-1, Sec. Dec. and Ord., January 13, 1984, slip op at 7. Said protection is lost, however, when the proper persons investigate the alleged hazard, find it to be safe, and explain this to the employee in adequate fashion. Stockdill v. Catalytic Industrial Maintenance Co., Inc., 90-ERA-43 (Sec'y Jan. 24, 1996). Additionally, an employer may not discriminate against an employee for assisting or participating in any manner or proceeding in order to carry out the purposes of the Act. 42 U.S.C. §5851(a)(1)(F).

In this instance, Complainant informed Respondent, through its employees, that he believed the radiation dosage emitted during the seed inspection process was dangerous, and, by implication, in excess of the regulatory and internal limits. By notifying his trainer, supervisor and radiation safety officer of the allegedly hazardous working conditions, he was engaging in the very behavior that the Act was intended to protect. DeFord v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983). That Respondent's employee, Mr. Zdunek, believed Complainant to have been genuinely concerned about the issue is indicative of the genuineness of the alarm, as is the tenor of Complainant's testimony.

The reasonable nature of his belief is apparent given the brief one-day training he had undergone at that point and the paucity of his experience, as Respondent pointed out, in conjunction with the measurement of the radiation detector. (TR 27, 37 - 38). Indeed, the employee responsible for training Mr. Eltzroth, Ms. Graney, appeared to consider the results of his test seriously, since it was uncontested that she "was surprised to learn that the glove was not protected," and she entertained another measurement with a different glove. (TR 12). She then referred Complainant to the radiation safety officer. Her reaction lends credence to the reasonableness of his belief as to the presence of a hazardous condition, particularly in light of Ms. Graney's longer tenure with the company (three weeks, as compared with Complainant's one and a half days, at that point). Mr. Wronkiewicz's reaction similarly support this conclusion. Respondent did not challenge Complainant's assertion that the

supervisor, whose history with the company is extensive, witnessed a repeat of the detector-glove test, and, upon seeing the allegedly negative results, stated “that was kind of informative.” (TR 14). Efforts appear to have been made to calm Complainant’s fears. However, there is no indication in the record that an investigation was undertaken, other than a repeat of the detector-glove test, which obviously did not dispel the concern. Additionally, the explanation to Complainant was lacking, in part because little inquiry went into the matter, and in part because his concern was addressed with data that did not answer his question, since the badges did not measure the radiation dosage of the occasionally exposed forearm. Moreover, aside from his initial refusal and reluctance to perform the task, he alerted his employer of the alleged hazard, which clearly constitutes protected activity under the ERA. 42 U.S.C. §5851(a)(1)(A).

For the foregoing reasons, I find that Complainant’s expression of concern to his employer, and his refusal to work, constitute protected activity within the meaning of the Act.

That Respondent was aware of Complainant’s protected activity is not in dispute. Claimant expressed his concerns directly to Respondent’s employees, including a supervisor and a radiation safety officer. He also immediately refused to perform the assigned task, and informed the person responsible for his training, as well as the supervisor and safety officer. Respondent did not contest this issue in its argument, and I find it clear from the testimony and exhibits that Respondent was aware of Complainant’s expression of his concerns of hazardous radioactivity, which, as stated above, is protected activity. He therefore satisfies this element of his prima facie case.

It is also well established that Respondent effected an adverse act upon Complainant. After working for Amersham for three days, Claimant was fired, a fact on which all parties agree. Discharge of an employee is clearly an adverse act in accordance with the Act. 42 U.S.C.A. §5851(a)(1). Respondent has not contested this issue, and I find that Complainant has satisfied this element of his prima facie case as well.

Complainant has also satisfied the final element of his prima facie case, that is, he presented evidence sufficient to raise the inference that the adverse action occurred as a result of his protected activity. Where protected activity and an adverse action occur within a close period of time, that coincidence constitutes solid evidence of causation, an inference of a retaliatory motive is justified, and a prima facie case of

retaliatory discharge is established. Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989); Mitchell v. Baldridge, 759 F.2d 80, 86 (D.C. Cir. 1985); Zinn v. University of Missouri, 93-ERA-34 and 36 (Sec'y Jan. 18, 1996); White v. The Osage Tribal Council, 95-SDW-1, slip op. At 4 (ARB Aug. 8, 1997); Conaway v. Valvoline Instant Oil Change, Inc., 91- SWD-4 (Sec'y Jan. 5, 1993). Complainant informed Respondent of the possibly hazardous condition, and refused to perform the seeds inspection, on the second day of his employment. The next day he was discharged. (TR 20 - 21). This one-day temporal nexus between protected activity and adverse action is clearly so close in time that it is sufficient to raise the inference of retaliatory motive, thereby satisfying Complainant's prima facie case. See Willy v. The Coastal Corp., 85-CAA-1 (Sec'y June 1, 1994) (six month period between protected activity and adverse action sufficient to raise inference of causation); Abu-Hjeli v. Potomac Electric Power Co., 89-WPC-1 (Sec'y Sept. 24, 1993) (ten day period); Thompson v. Tennessee Valley Authority, 89-ERA-14 (Sec'y July 19, 1993) (two week period); Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd., 91-ERA-13 (Sec'y Oct. 26, 1992) (two day period). I note that Complainant has presented no other evidence from which to infer that Respondent acted with discriminatory animus.

The inquiry does not end there, however, for while establishment of this temporal nexus is sufficient for the purposes of Complainant's prima facie case, it is only one factor for consideration of the ultimate question as to whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action. Jackson v. Ketchikan Pulp Co., 93-WPC-7 and 8 (Sec'y Mar. 4, 1996). Employer is next afforded the opportunity to rebut this inference by producing evidence of a legitimate, nondiscriminatory reason for the adverse action. Zinn, supra at 4. Respondent's burden in this regard is one of production, not persuasion; that is, Respondent need only produce evidence of such a rationale to satisfy its burden, and need not convince the trier of its verity. Bausemer v. TU Electric, 91-ERA-20 (Sec'y Oct. 31, 1995), citing Kahn v. United States Secretary of Labor, 64 F.3d 271, 278 (7th Cir. 1995). Respondent has done so here. It contends that Complainant was discharged for his failure to perform his job, and has supported this contention with testimony and exhibits. The testimony of the hiring supervisor, Mr. Wronkiewicz, reflects that Complainant was discharged due to his refusal to perform the work for which he was hired. It is clear from the testimony of Complainant, the radiation safety officer and the supervisor that Complainant refused and was reluctant to

perform a job for which he was hired and about which he was informed. The report submitted pursuant to the IDNS investigation indicates that it concluded that Complainant was released for his "refusal to perform the duties required by [his] position, not because of [his] radiation safety concerns." (RX 1). The reports described above by the radiation safety officer, supervisor, the person who trained him (Ms. Graney) and the receptionist each support Respondent's contention that Mr. Eltzroth refused to perform the work, and the reports of the supervisor and the radiation safety officer are supportive of the assertion that Complainant was then fired as a result. (RX 3). Perhaps most telling is Complainant's own testimony that, had he performed the seeds inspection work, he would not have been terminated. (TR 38). With these proofs, Respondent has satisfied its evidentiary burden, and has articulated a legitimate, nondiscriminatory reason for its adverse action.

At this point it is incumbent upon Complainant to show that Respondent's proffered reason is mere pretext for the actual motive, i.e., to discriminate against Complainant because he undertook protected activity. Zinn, supra; Frady, supra. This is so because the burden of showing that the employer's adverse action was discriminatory rests at all times with the complainant. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). He may show the reason to be pretextual by showing that an unlawful reason was more likely the cause of the discharge, or that the proffered explanation is unworthy of credence. St. Mary's, supra; Nichols v. Bechtel Construction, Inc., 87-ERA-44 (Sec'y Oct. 26, 1992), slip op. at 13.

Complainant has failed to so prove here. The only basis upon which a finding of discriminatory animus may be made, on this record, is the close temporal proximity between his expression of concern and his discharge. Respondent's evidence is more persuasive and of greater weight in this regard. Its supervisor, Mr. Wronkiewicz, testified in a credible manner that Complainant was discharged due to his discomfort and reluctance toward performing the task for which he was hired. Complainant had earlier refused to perform the task, and expressed zero tolerance for radiation exposure. It is apparent from Mr. Wronkiewicz's testimony that Complainant was aware of the possibility of radiation dosage within government guidelines prior to his employment. Nevertheless, Complainant declined to perform the work, and desired zero radiation exposure, even though he was informed that he would be exposed to legal levels of radiation. Further, the unchallenged testimony regarding the reactions of the supervisor, safety officer and trainer to Mr. Eltzroth's expression of concern support Respondent's rationale

for the discharge. As seen above, Complainant's concerns were directly addressed; attempts were made to assuage his fears, he was reminded of the reason he was hired, and, upon his expression of reluctance, was discharged. Complainant has thus offered no evidence which would reflect a retaliatory attitude on behalf of Respondent's employees. While such direct evidence is not required in a case brought pursuant to the ERA, it would count for much where, as here, Complainant has offered scant cause for drawing an inference of discriminatory animus, and Respondent has offered much in the way of largely uncontroverted testimony with regards to its motive for discharging Complainant.

Moreover, the report submitted pursuant to the IDNS investigation reflects that the task for which he was hired was indeed in conformity with these requirements. While Complainant attempted to cast doubt upon the veracity of this report, his insinuation that it was influenced by relationships between Amersham employees and the IDNS falls short, since he established the relationships were of the "acquaintance" variety, and no other evidence on the point was introduced. Additionally, Respondent has produced persuasive and uncontroverted testimony that radiation concerns of Respondent's employees are routinely addressed without repercussion. Moreover, Complainant agreed at the hearing that, had he performed his job, he would not have been fired. From this it is reasonable to infer that despite his voiced concern, he would have retained his position.

For the foregoing reasons, I find that Complainant has not shown Respondent's proffered reason for the discharge to have been pretextual in nature. Upon consideration of the above testimony and exhibits, the basis of Complainant's assertion that he was discharged in retaliation for his protected activity is insufficient in this case. Rather, Respondent has shown that Mr. Eltzroth was discharged for failing to perform the job which he agreed to perform, preferring instead to avoid working in a position that exposed him to any radiation. Complainant has failed to show either that discrimination was the more likely cause of his discharge, or that Respondent's explanation was unworthy of credence. Frady, supra. A decision to discharge violates the ERA only if it was motivated by discriminatory animus, and Complainant bears the burden in this respect. Id.; Dysert, supra. I find that Complainant has not satisfied this burden in the instant case.

Since Complainant has failed to establish that illegal animus, in whole or in part, motivated Respondent's actions against Complainant, "dual motive" analysis is inapplicable in this case.

## CONCLUSION

Complainant has failed to establish that Respondent was motivated by unlawful animus in terminating his employment. In addition, Respondent has come forward with credible and more persuasive evidence that Complainant's discharge was the result of legitimate, non-discriminatory reasons unrelated to Complainant's protected activity. Consequently, I find that Complainant has failed to establish that Respondent violated the Act.

In light of the foregoing, Respondent is not responsible for Complainant's attorney's fees.

## RECOMMENDED ORDER

For the foregoing reasons I recommend that Complainant Ted Eltzroth’s request for relief pursuant to the ERA be denied and that his claim be dismissed.

Ainsworth H. Brown
Administrative Law Judge

**NOTICE:** This Recommended Decision and Order and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. See Fed Reg. 19978 and 19982 (1996).

1. RX refers to Respondent’s exhibits and TR refers to the Hearing Transcript.